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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/055,513	01/23/2002	Anthony Brennan	1442026	9358
23405	7590	02/16/2005	EXAMINER	
HESLIN ROTHENBERG FARLEY & MESITI PC 5 COLUMBIA CIRCLE ALBANY, NY 12203			FETSUGA, ROBERT M	
			ART UNIT	PAPER NUMBER
			3751	

DATE MAILED: 02/16/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/055,513

Applicant(s)

BRENNAN ET AL.

Examiner

Robert M. Fetsuga

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 11 January 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-41 is/are pending in the application.
- 4a) Of the above claim(s) 19,20,22,33 and 37-39 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-18,21,23-32,34-36,40 and 41 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 23 January 2002 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

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1. The finality of the Office action mailed August 03, 2004 is hereby withdrawn in light of potential examiner error in disclosure and claim interpretation.

2. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the "affixed" limitation set forth in claims 1, 24, 28, 34 and 40 must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. The replacement sheet(s) should be labeled "Replacement Sheet" in the page header (as per 37 CFR 1.84(c)) so as not to obstruct any portion of the drawing figures. If the changes are not accepted by the examiner, the applicant will be notified and informed of any required

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corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

3. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: Proper antecedent basis for the "affixed" limitation set forth in claims 1, 24, 28, 34 and 40 could not be found in the specification. Applicant is reminded claim terminology in mechanical cases should appear in the descriptive portion of the specification by reference to the drawing(s).

Applicant did not address this term in the response filed June 30, 2004.

4. Claims 1-18, 21, 23-32, 34-36, 40 and 41 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Claim 1 recites a body "immovable and affixed to said surface during operation". This subject matter is not described in the originally filed disclosure and is therefore considered

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to be new matter. Claims 24, 28, 34 and 40 similarly recite the noted subject matter.

Applicant's argue at pages 5-6 of the brief filed January 11, 2005 "the figures clearly disclose the immovability of the device during operation by the depiction in FIGS. 1 and 2, which show the device being inserted through a hole in a wall of a spa and being attached via nut 262 (sic) attached to threads 255 of side walls 250 of body 11." The examiner can not agree.

Initially, it is noted the ordinary meaning of the term "immovable", according to "The American Heritage Dictionary", is --incapable of being moved--. Applicants' system is capable of being moved since nearly anything is capable of being moved. In any event, applicants' disclosure fails to teach a "device being inserted through a hole in a wall of a spa and being attached via nut 262 (sic) attached to threads 255 of side walls 250 of body 11", as argued. Applicants' disclosure merely states "sidewalls 250 may include exterior threads 255 for mating with a nut 260 to securely position fluid flow system 10 on tub wall 20" (par. 0029) and "tub wall 20 with threads 255 may be unitary and/or integral..." (par. 0031 and 0034). Clearly, the sidewalls 250 are illustrated as part of the tub in Fig. 2. This ambiguous disclosure does not show applicant possessed immovability of the body 11 as now recited in the claims.

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5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 1-5, 7, 10, 18, 21, 22, 24, 25, 28, 29, 31, 32, 34-36 and 40, as best understood, are rejected under 35 U.S.C. 102(a)/(e) as being anticipated by Gardenier et al.

The Gardenier et al. (Gardenier) reference discloses a hydrotherapy tub comprising (claim 24): an inner surface 11

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including an opening (receiving 50); an air source/means (col. 3 lns. 6-9); a water source/means (col. 3 lns. 6-9); a body 10 including a first chamber 16 and a second chamber 18; a plurality of outlets/means 20,22; a water inlet 14; and an air inlet 12, as claimed. Re claim 1, the Gardenier body appears to be "immovable and affixed to said inner surface during operation" in the same sense as with applicant's disclosed invention. Re claim 7, note column 6, lines 6-9. Re claim 10, note column 6, lines 60-63.

7. Claims 1-10, 18, 21-23 and 28-32, as best understood, are rejected under 35 U.S.C. 102(b) as being anticipated by Martin '259.

The Martin '259 (Martin) reference (Figs. 7-10) discloses a fluid flow system comprising: a body 59 including a water inlet 5, an air inlet 6, a first chamber 68, a second chamber 69, and a plurality of perpendicular outlets/means 75, as claimed. Re claim 1, the Martin body is capable of being used with a tub having an opening (e.g. in the bottom) as functionally recited. Furthermore, should one decide to insert the air and water inlets 5,6 through the opening, the body would cover the opening and be "immovable and affixed to said inner surface during operation" in the same sense as with applicant's disclosed invention. Re claim 18, note page 5, lines 46-52.

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8. Claims 1-10, 16-18, 21-23 and 28-32, as best understood, are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin.

Re claim 16, although the air outlets 75 are not located inside the water outlets 74, as claimed, it would have been obvious to one of ordinary skill in the art to reorient the air and water outlets as merely involving a reversal of parts where operation of the hydrotherapy tub would not be materially affected. Moreover, the Figs. 12 and 13 embodiment of Martin evidences utilizing air outlets 139 located inside water outlets 140.

9. Claims 1-10, 16-18, 21-32, 34-36, 40 and 41, as best understood, are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin as applied to claims 1 and 16 above, and further in view of Gardenier.

The Martin fluid flow system is installed in a hydrotherapy tub 39. Therefore, Martin discloses all claimed elements except for the tub including an opening.

Although the inlets of the Martin hydrotherapy tub do not extend through an opening, as claimed, attention is directed to the Gardenier reference which discloses an analogous hydrotherapy tub which further includes inlets 12,14 extending through an opening (receiving 50). Therefore, in consideration



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of Gardenier, it would have been obvious to one of ordinary skill in the art to associate an opening with the Martin tub in order to facilitate installation of the body by concealing the inlets from view.

Applicant's argue at pages 9-11 of the brief Martin "teaches away" from creating an opening in a tub because the fluid conduits extend outside the tub. The examiner can not agree. The installations of the fluid flow systems illustrated in Martin are merely exemplary. See page 2, lines 103-106. Therefore, Martin can not be said to "teach away" from other installations. In fact, this disclosure in Martin suggests other types of installations. Moreover, Gardenier discloses a fluid flow system installation, like that of Martin, except Gardenier teaches one how to fit two conduits through an opening in a tub wall while also covering the opening and immovably affixing the system to the wall. Ultimately, the hydrotherapy device of Martin would function as intended whether the fluid supply conduits extend over the tub wall or through the tub wall. This has been acknowledged at page 10 of the brief. Further in this regard, it is noted at least one of the supply conduits in Martin extends through a tub wall (see Fig. 7). Applicant's argue at pages 11-12 of the brief Martin has not been considered as a whole because Martin specifically teaches

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particular supply conduits. The examiner can not agree. The Martin disclosure is not as narrow as applicant's conveniently portray. Indeed, Martin teaches his invention lies in a two-chambered body having injector devices. See page 5, lines 72-77, and claim 7 (for example), in Martin.

10. Claims 11-15, as best understood, are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin either alone or taken with Gardenier as applied to claims 1 and 16 above, and further in view of Guiler.

Although the injectors 74,75 of the Martin hydrotherapy tub do not include conical structures, as claimed, attention is directed to the Guiler reference which discloses an analogous hydrotherapy tub which further includes an injector 2 having a conical structure 18. Therefore, in consideration of Guiler, it would have been obvious to one of ordinary skill in the art to associate conical structures with the Martin injectors in order to increase flow velocity.

Applicant's argue at pages 13-14 of the response perceived deficiencies of the Guiler reference individually, however, nonobviousness can not be established by attacking references individually when a rejection is predicated upon a combination of prior art disclosures. Guiler has been relied upon for

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teaching a conduit 2 having a conically shaped end 18. This teaching has been acknowledged at page 13 of the brief.

11. Applicant's remaining remarks have been fully considered and either have been previously addressed or are not deemed persuasive in view of the prior art as specifically applied in light of the level of skill in the pertinent art.

12. Applicant is referred to MPEP 714.02 and 608.01(o) in responding to this Office action.

13. Applicant is advised that should appeal be again pursued, any brief must comply with 37 CFR 41.37. The brief filed January 11, 2005 fails to comply with section (c)(v) Summary of claimed subject matter, in that the claims were not identified, and the structure, material, or acts described in the specification as corresponding to the means-plus-function clauses was not identified.

14. The grounds of rejection have been reconsidered in light of applicant's arguments, but are still deemed to be proper.

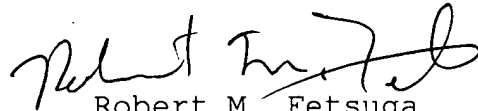
**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action

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is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

15. Any inquiry concerning this communication should be directed to Robert M. Fetsuga at telephone number 571/272-4886 who can be most easily reached Monday through Thursday.

A handwritten signature in black ink, appearing to read 'Robert M. Fetsuga', is written over the typed name.

Robert M. Fetsuga  
Primary Examiner  
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